THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

April 8, 1977

MEMORANDUM FOR: Mr. Robert J. Lipshutz
Counsel to the President

FROM: Herbert J. Hansell

SUBJECT: The War Powers Resolution
(Public Law 93-148)

Introduction

The power to commit the United States to war is shared by the Congress and the President under the Constitution. The express powers granted to Congress include:

> "To declare war ...; To raise and support armies ...; To provide and maintain a Navy; To make rules for the government and regulation of the land and naval forces ..."

The constitutional powers of the President in this regard are expressed even more succintly:

> "The President shall be Commander in Chief of the Army and Navy of the United States ..."

Debate over the meaning and application of these brief statements of authority has persisted throughout our nation's history. However, until recently, the issues have been dealt with primarily as a matter of practical accommodation between the Legislative and Executive Branches. Presidents have committed the armed forces to combat on many occasions without explicit authorization from Congress, but have usually been reluctant to initiate or continue military action in situations where Congressional support was clearly lacking.

Growing opposition in Congress to the prolonged involvement of the United States in Indochina intensified the war powers debate in the late 1960's. Then, President Nixon's unilateral decision to introduce US forces into Cambodia in May 1970 motivated Congress to seek, through legislation, to restore the constitutional balance. A flurry of legislative

activity and extensive hearings commenced, culminating in the enactment on November 7, 1973, over the President's veto, of Public Law 93-148 (copy attached at Tab A).

Public Law 93-148, the War Powers Resolution, is chiefly procedural in character. It does not purport to delineate the circumstances in which the President can engage the armed forces in hostilities without a declaration of war or specific statutory authorization. Rather, it compels the President to inform Congress when U.S. forces are engaged and to seek Congressional authorization for continuation of involvement after the initial introduction of forces into hostilities or situations where hostilities are imminent.

Principal Features of the Resolution

Consultation

Section 3 of the War Powers Resolution directs the President to consult with Congress "in every possible instance" before introducing U.S. forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. This section also requires regular consultation with Congress after forces are so introduced until they are removed.

Although the language of Section 3 leaves the President with discretion to decide on a case by case basis whether prior consultation is possible, experience has shown that Congress expects to be consulted in virtually every case. The adequacy of consultation in the four relevant incidents since the Resolution's enactment (evacuations of Danang, Phnom Phenh and Saigon, rescue of the Mayaguez crew) has been criticized as being more in the nature of informing Congress than seeking its views. This can be explained in part by the nature of the four operations. All were of brief duration, were undertaken in rapidly changing circumstances, and were designed to achieve humanitarian rescues. The President's authority under Section 3 has not been delegated and no formal implementing procedures have been devised.

The Resolution does not specify the members of Congress to be consulted. This avoids the risk that the President might be accused of having failed to discharge a statutory responsibility in the event a key member was unavailable. Previous Executive Branch consultations

under this section have included the House and Senate leadership, and the Chairmen and ranking minority members of the foreign affairs and armed services committees. A similar list of members to be consulted was proposed by Senator Eagleton in the 94th Congress as an amendment to the Resolution. No action was taken on his amendment (S. 1790).

For reasons described more fully below, the obligation to consult, if possible, arises not only from the dispatch of U.S. forces to engage in combat, but also when U.S. forces are introduced into situations where there is substantial risk to their personal safety from hostile fire.

Reporting

Section 4 of the Resolution requires the President to submit a written report to the Speaker of the House and the President pro tempore of the Senate within 48 hours after US forces are introduced:

-- into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; or

-- into the territory, airspace or waters of a foreign nation, while equipped for combat (including introductions which substantially enlarge combat equipped U.S. forces already located in a foreign nation).

The significant distinction between the two types of situations that must be reported is that the first category is subject to Congressional action under section 5 of the Resolution, described below. Situations falling in the second category alone entail only a reporting obligation.

The first of the above two types of situations where reports are required is not limited to deployments of forces equipped for combat. The Resolution's legislative history indicates that a report could be required even if unarmed U.S. military personnel were sent into a situation where they would be subjected to hostile fire. However, the distinction of whether or not the forces are combat equipped is not likely to have much practical sig-

nificance because unarmed personnel would not normally be introduced into situations where Section 4 would require a report.

In the second category of situations (those not involving ongoing or imminent hostilities) reports are not required in the case of deployments of forces equppied for combat "which relate solely to supply, replacement, repair, or training" of the forces introduced. In addition to these express exemptions, the Resolution's legislative history indicates that the reporting requirement was intended to apply to commitments of U.S. combat forces "to alter or preserve the existing political status quo or to make the U.S. pressure felt." Accordingly, a report would not appear to be required if, for example, an armed reconnaissance vessel entered foreign waters with the expectation of avoiding detection, and instructions, if detected, to proceed immediately to international waters. Reports have not been submitted in the case of routine deployments for entirely peaceful purposes, such as naval ship visits to friendly ports.

Each report must set forth:

-- The circumstances necessitating the introduction of U.S. forces;

-- The constitutional and legislative* authority under which the introduction took place; and

-- The estimated scope and duration of the hostilites or involvement.

After the initial report, periodic status reports are required no less often than every six months throughout the duration of the hostilities or situation that required the original report.

The function of making reports under section 4 of the War Powers Resolution has not been delegated by the President. However, procedures have been established to ensure that situations requiring reports are brought promptly to the President's attention. Specifically, the Legal Adviser to

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* Section 8(a) of the Resolution discussed below at page 8, precludes reliance upon legislative authority other than a statute which indicates it is intended to constitute specific statutory authorization to introduce forces within the meaning of the War Powers Resolution.

the Chairman of the Joint Chiefs of Staff informs the Department of Defense General Counsel of all troop deployments which could raise a question under section 4. This information is also made available to the Legal Adviser of the Department of State. The State Department's Legal Adviser and the Defense General Counsel are jointly responsible for bringing immediately to the attention of the Secretaries of State and Defense cases where it would be appropriate for them to recommend to the President that a report be submitted to Congress under section 4. (As an internal procedure, the Legal Adviser also informs the Secretary of State of any cases which are considered, but found not to require a report. This was done, for example, in the case of last year's slight augmention of U.S. forces in Korea following the DMZ incident in which several U.S. military personnel were killed.) Congress has been informed of these implementing arrangments.

Congressional Action

Section 5 of the War Powers Resolution provides for Congressional participation in decisions to continue or terminate U.S. military involvement in situations requiring a report under section 4 of the Resolution because of ongoing or imminent hostilities. During the first 60 days after the report is (or should have been) submitted, the burden is on Congressional opponents of the President's action. To terminate U.S. involvment during this period requires a concurrent resolution directing the President to remove the forces. After 60 days, the burden shifts to the President. (The 60 day period may be extended to 90 days by the President in an emergency as described in the following paragraph.) He must withdraw the forces by that time unless Congress has declared war,* enacted specific statutory authorization, enacted legislation extending the 60 day period, or is physically unable to meet "as a result of armed attack upon the United States."

The President may continue the involvement of US forces for not more than 30 additional days beyond the initial 60-day period if he determines and certifies to

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* Declarations of war have traditionally taken the form of a joint resolution. When approved by the President, they become public laws and are legally indistinguishable from other laws enacted in accordance with Article I of the Constitution.

Congress in writing "that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

Section 5(c) of the Resolution provides that, in the absence of a declaration of war or specific statutory authorization, Congress may at any time direct the President, by concurrent resolution, to remove U.S. forces from engagement in hostilities outside the United States. This provision would apply not only during the initial 60 days in which forces might be engaged by the President under his constitutional powers, but also during any subsequent 30 day period while he was continuing military operations on an emergency basis in order to protect forces being withdrawn.

Section 5 raises serious constitutional questions. Even if Congress can by statute limit the powers of the President in this area of shared constitutional responsibilities, it is by no means certain that a sixty day limitation would be valid in every conceivable application. Situations might arise where a more prolonged engagement of U.S. forces would be necessary to fulfillment of the President's duty to protect the nation, even if Congress had not acted.

Another serious concern is posed by the possible application of a concurrent resolution to terminate a military operation ordered by the President under his constitutional powers as Commander in Chief. This section of the Resolution states, in effect, that Congress may in the future limit the exercise of a Presidential power through a procedure which deprives the President of the opportunity to veto the limitation. This use of a concurrent resolution is different from the situation considered by the Attorney General in his opinion of January 31, 1977, concerning the resolution of disapproval feature in the Reorganization Act (5 U.S.C. 906(a)). In this case the resolution feature purports to limit a power derived, not from Congress, but from the Constitution. Nevertheless, this provision appears to have the effect of evading the constitutional safeguard of the Presidential veto -- a criterion applied by the Attorney General for determining the compatability of such a provision with Article I, §7 of the Constitution.

The public attitude toward Section 5 adopted by the Executive Branch has been to avoid speculation about what the President might do in hypothetical situations where application of the War Powers Resolution might be of doubtful constitutional validity. While preserving the President's constitutional position, the emphasis has been placed on the likelihood of agreement between the President and Congress as to when the commitment of U.S. forces will be necessary to protect our national interests.

Other Provisions

Most of the remaining provisions of the War Powers Resolution involve statements of policy and interpretation, internal Legislative Branch procedures, and other ancillary matters. A few of these are worthy of note.

Powers of the President

Section 2(c) of the Resolution contains a statement of the President's constitutional power as Commander in Chief to introduce forces into hostilities. According to this statement, the President's power, absent a declaration of war or statutory authorization, extends only to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

The inclusion of this provision in a section of the Resolution entitled "Purpose and Policy" and the inclusion of a separate provision (section 8(d)) disclaiming any intent to alter the constitutional authority of either the President or Congress suggest that section 2(c) was not intended as an exhaustive enumeration of Presidential war powers. This conclusion is also supported by the relevant legislative history. Congress has generally accepted the President's authority to employ force to rescue endangered American citizens. Senator Eagleton's proposed amendment in 1975 would have added a specific provision in section 2(c) on the rescue of American citizens.

Section 8(d)(2) makes clear that the War Powers Resolution does not itself grant to the President any new or increased authority to commit U.S. forces.

Effect on Treaties and Other Laws

Section 8(a) of the Resolution states that authority to introduce U.S. forces into hostilities or situations where hostilities are imminent shall not be inferred from any statute or treaty except where the statute, or legislation implementing the treaty, states it is intended to constitute specific authorization within the meaning of the War Powers Resolution. In addition, section 8(d)(1) disclaims any intent to alter treaties in force.

No President has asserted that any of our mutual defense treaties constitutes a standing authorization for the President to commit U.S. forces in the fulfillment of treaty obligations. All of our defense treaties provide specifically that their implementation shall be in accordance with the constitutional processes of the parties. The question of whether the President would have to seek specific Congressional authorization would depend upon whether, under the circumstances, the commitment of U.S. forces was within the constitutional power of the President.

Similarly, the Executive Branch informed Congress in 1970 that it did not rely on any of the "area resolutions" (e.g., section 2 of the Resolution to Promote Peace and Stability in the Middle East, 22 U.S.C. 1962) as a current statutory authorization to commit U.S. forces. This position was arrived at on the ground that each of these resolutions had been enacted in response to a specific crisis which had long since passed. Section 8(a) of the War Powers Resolution has now confirmed that the area resolutions cannot be relied on for such authority.

Attachments:

A. Text of Public Law 93-148.
B. Section-by-Section Analysis (prepared by the Department of Justice at the time the War Powers Resolution was enacted).